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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EFRAM REED, Defendant and Appellant.	B253107 (Los Angeles County Super. Ct. No. TA129291)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tammy Chung Ryu, Judge. Affirmed.

Mark S. Devore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Efram Reed (defendant) appeals from the judgment entered after he was convicted of two counts of assault by means likely to produce great bodily injury. Defendant claims that the two counts involved the same crime, and contends that multiple conviction was prohibited. He also contends that the trial court abused its discretion in denying his motion to represent himself, that the court should have instructed the jury with regard to aiding and abetting, and that defense counsel failed to provide constitutionally effective assistance. We conclude that an aiding and abetting instruction was warranted but its omission was not prejudicial. Finding no merit to defendant's remaining contentions, we affirm the judgment.

BACKGROUND

Defendant was charged in counts 1, 4, and 5 of an amended information. Count 1 alleged that defendant committed an assault by means likely to produce great bodily injury upon Jasmine Reyes (Reyes) on May 5, 2013, in violation of Penal Code section 245, subdivision (a)(4).[1] Count 5 alleged that on the same date defendant and codefendant Cassandra Brown (Brown) committed an assault by means likely to produce great bodily injury upon Reyes, also in violation section 245, subdivision (a)(4).[2] Defendant was charged in count 4 with misdemeanor resisting, obstructing, or delaying a peace officer in the discharge of his duty on July 24, 2013, in violation of section 148, subdivision (a)(1). The amended information further alleged that counts 1 and 5 were gang related within the meaning of a section 186.22, subdivision (b)(1)(A); and for purposes of section 667, subdivision (a)(1), and the "Three Strikes" law (§§ 1170.12, 667, subd. (b)-(j)), the information alleged that defendant had suffered three prior serious or violent felony convictions.

During trial, defendant entered a plea of no contest to count 4. The jury found defendant guilty as charged of counts 1 and 5. Brown was found guilty of count 5. After the jury was unable to reach a unanimous conclusion on the gang allegation, a mistrial

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1 All further statutory references are to the Penal Code, unless otherwise indicated.

2 Brown is not a party to this appeal.

was declared and the allegation was dismissed. The trial court granted the People's motion to amend the information to substitute a one-year prior prison term enhancement pursuant to section 667.5, subdivision (b). Defendant waived trial on the prior convictions and admitted them.

On December 5, 2013, the trial court imposed a 10-year sentence consisting of the high term of four years as to count 1, doubled as a second strike, and enhanced by one year due to the prison prior, plus a consecutive one-year term as to count 4. The court struck the two remaining strike convictions for purposes of sentencing. As to count 5, the court imposed one-third the middle term, doubled it as a second strike to two years, and stayed execution pursuant to section 654. The court imposed mandatory fines and fees, and ordered victim restitution in an amount to be determined. A total of 269 days of custody credit was granted, consisting of 135 actual days and 134 days of conduct credit.

Defendant filed a timely notice of appeal from the judgment.

Evidence presented

Reyes and defendant had been in a dating relationship, and Brown and defendant were friends. On May 5, 2013, three days after Reyes ended her relationship with defendant, she was driving home when defendant drove toward her. Defendant then blocked Reyes's way, approached her on foot, opened her door, and pulled her out of her car. Reyes saw defendant's friend Brown and about 40 gang members in the area. Defendant pulled Reyes by the hair, shook her, choked her, punched her multiple times, and then threw her to the ground, where he kicked her in the head. During the attack defendant said, "Bitch, you have me all fucked up." Reyes then heard Brown say something like, "Are you okay, homie?" Defendant replied, "You better get this bitch before I kill her." As Reyes attempted to get up Brown ran toward her. Defendant "backed up a little bit" as Brown approached. Brown then delivered a blow which Reyes's described as a shove-slap type "jam" to her face, causing Reyes to fall back down, hitting her back hard on the concrete. Defendant and Brown then left the scene as Reyes got into her car. Reyes suffered a swollen eye, a cut lip, an injured leg, and swelling on her face and head.

Defendant was arrested on July 24, 2013, and a protective order was issued prohibiting him from contacting Reyes. About two weeks later, the day before Reyes was scheduled to testify at the preliminary hearing, defendant telephoned her from the jail. In the recorded call, defendant called Reyes "sweetie" throughout the conversation and urged her not to appear in court despite having been served with a subpoena. Defendant said, "Don't go, because they're going to try to get you to say -- 'is he the one that whoo-di-whoo?' And then they'll bail me over to security court . . . ." He also urged her to stay with a friend and not tell her mother her whereabouts so that the District Attorney would eventually reject the case and he would not stand trial. Reyes was afraid to testify, failed to appear, and was in custody at the time of her trial testimony.

Defendant's ex-wife Cassandra Boone (Boone) testified that in 2008, about three months after they separated, defendant telephoned her and threatened to kill her. About one month after that call, while driving her daughter to school, defendant followed her and blocked her car when she stopped at a stoplight. When Boone said she was going to call 911, defendant reversed his truck, crashed it into her car and then left the scene. Boone had known defendant for 20 years, began dating him in the eighth grade, and knew him to be a member of the Main Street Crips, a criminal street gang.[3]

DISCUSSION

I. *Faretta*[4] motion

Defendant contends that the trial court abused its discretion in denying his motion to represent himself ("*Faretta* motion"). The Sixth Amendment to the United States Constitution grants criminal defendants the right to counsel in all proceedings that may substantially affect their rights. (*Mempa v. Rhay* (1967) 389 U.S. 128, 133-134.) The right to counsel may be waived if the waiver is knowing and intelligent. (*Faretta, supra*, 422 U.S. at p. 807; *People v. Bradford* (1997) 15 Cal.4th 1229, 1363.) So long as the

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[3] The prosecution presented other evidence of defendant's gang membership, as well as the testimony of a gang expert. As the gang allegation was dismissed after the jury was unable to reach a verdict on that issue, we do not summarize the gang evidence.

[4] See *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

defendant's request is made knowingly and voluntarily, and asserted within a reasonable time prior to trial, the right of self-representation is absolute. (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) Otherwise, the issue is left to the trial court's discretion. (*People v. Windham* (1977) 19 Cal.3d 121, 127-129 (*Windham*).)

During the second day of jury selection, defendant rejected a plea offer and told the trial court, "I would like to exercise my [*Faretta*] rights to represent myself in this case." Since defendant's *Faretta* motion was made during jury selection, it was untimely. (See *People v. Valdez* (2004) 32 Cal.4th 73, 102 ["moments before jury selection"].) In ruling on an untimely *Faretta* motion, the trial court should consider such factors as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Windham, supra*, 19 Cal.3d at p. 128.) "[A] trial court's exercise of discretion in denying an untimely *Faretta* motion is properly affirmed if substantial evidence in the record supports the inference that the court had those factors in mind when it ruled. [Citation.]" (*People v. Bradford* (2010) 187 Cal.App.4th 1345, 1354.) "'[A] reviewing court must give "considerable weight" to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made.' [Citation.]" (*Id*. at p. 1353.) A trial court's ruling is an abuse of discretion only when it is so arbitrary, capricious, or absurd as to constitute a miscarriage of justice. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125 [abuse of discretion standard].)

When defendant made his request, the trial court treated it both as a *Faretta* motion and a motion to relieve counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). The court held an in camera hearing, and turned first to the *Marsden* issue, as quality of counsel's representation was relevant to the *Faretta* motion. Defendant claimed to have informed counsel that defendant had told his parole officer, Agent Quasada, that Reyes began acting belligerent and "funny" three months before the incident, and defense counsel had failed to contact Agent Quasada. Defendant admitted

that Agent Quasada had not witnessed Reyes's behavior and had not spoken to Reyes directly, but believed his statements would have been recorded in the parole officer's files. Defense counsel explained to the court that an investigator had spoken with Agent Quasada, who had no recollection of defendant having ever said anything about harassment or anything by a woman named Jasmine and had no information about anything that was wrong in that relationship. Agent Quasada did not recall defendant well.

Defendant also claimed that it was Reyes who was angry on the day of the incident because defendant did not want to see her. He also complained that although he had provided counsel with the names of three eyewitnesses, counsel had not brought forward any witnesses on his behalf. Defense counsel told the court that he had been given the first name and the number of one witness, Charlie. After he made some calls to the number he eventually spoke to a woman named Divine who said that Charlie was her ex-boyfriend. She had no contact information for Charlie, and said she would give him a message to contact counsel's office. Charlie never made contact. Counsel had no way to reach the other witnesses, so he spoke to defendant's cousin Kenneth Reed, who said he might know of some witnesses. The weekend before trial began, the cousin left a voicemail message for counsel asking about the status of the trial and stating he had no information on any potential witnesses.

Defendant also complained that counsel had failed to subpoena his psychiatric records from various hospitals. When the trial court asked how the records might be relevant, defendant replied that whenever he was in a manic state he would blurt out things he did not mean, such as being in a gang.[5] Defendant said he was not a gang member and he had worked as a network technician for 13 years. Defense counsel explained that he had not subpoenaed any medical records because defendant had

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[5] Evidence was presented at trial that when defendant was arrested for a prior incident, he said to the officer, "I don't give a fuck, Main Street Crip gangster, cuz."

consistently denied anything had happened with Reyes and did not claim that the assault occurred for some reason that would make this a mental health case.

The trial court found that counsel had provided adequate representation and that defendant's mental health records would not be relevant prior to sentencing since defendant claimed he did not commit the crime. The court concluded that defendant's objections to counsel's representation were unfounded and denied the *Marsden* motion. The *Faretta* motion was denied as untimely. The court did not believe defendant's claim that he had not known he had the right to represent himself until that time since defendant had several prior experiences with court proceedings. Furthermore, defendant was articulate and appeared to be intelligent.[6] The trial court also noted that it was the second day of jury selection and granting the motion could interfere with codefendant Brown's right to a speedy trial.

It is apparent the trial court considered the *Windham* factors. Defendant had shown no proclivity to substitute counsel; however substantial evidence supports the court's express and implied findings that defense counsel's representation was adequate and that defendant's reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow did not favor granting the motion. (See *Windham, supra*, 19 Cal.3d at p. 128.)

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6 The court stated: "I really cannot believe somebody who is as intelligent as you . . . would claim now that you actually did not know that you have a constitutional right to represent yourself. You said you've been a technician for 13 years. I've read the transcripts, especially . . . the recorded conversation between you and the officers when you got . . . arrested. And I was actually impressed by the words that you used. There were . . . complicated words that people who are not educated or who are not intelligent would not be able to know or say it . . . that way. So I think that you're an intelligent person, and so for you to tell me you did not know . . . that you had a right, I really cannot believe it today. And it is presumed when you were first arraigned that you are advised of the right to represent yourself. . . . And you've gone through the court system a few times, not a lot but a few times, and . . . every time you're appointed an attorney. [A]lmost everybody knows that you can represent yourself. . . . So I am not going to grant the motion for you to represent yourself today. I don't find your reason to be really credible."

Defendant contends that because he did not request a continuance, the trial court abused its discretion in finding that defendant sought to delay the trial. He argues the facts of this case are comparable to those in *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1055-1058 (*Rogers*), where the appellate court found an abuse of discretion in denying a renewed request for self-representation made just before opening statements. In *Rogers*, when the defendant's first motion was made just prior to jury selection, defendant asked for a week's continuance to prepare. (*Id.* at pp. 1055-1056.) In the renewed motion, the defendant told the court that he did not need more time, was prepared to proceed to trial, and that he and defense counsel had profound differences of opinion as to how to proceed. (*Id.* at pp. 1057-1058.)

Rogers provides no apt comparison, as the appellate court did not hold that an abuse of discretion may be demonstrated solely by the absence of a prior proclivity to substitute counsel and request for a continuance, as defendant's argument suggests. In *Rogers*, unlike here, the defendant gave a legitimate reason for self-representation, and there were other facts indicating that the trial court had no reason to believe there would be any delay or disruption. (See *Rogers, supra,* 37 Cal.App.4th at p. 1057.) Similarly, in *People v. Nicholson* (1994) 24 Cal.App.4th 584, another case on which defendant relies, there was not only no request for a continuance, there was "no hint that one would be forthcoming if propria persona status was granted." (*Id.* at p. 592, fn. omitted.)

Here by contrast, defendant's reasons for requesting self-representation supported the trial court's concerns about a delay. Defendant wished to subpoena his mental health records from several hospitals to prove that he falsely claimed to be a gang member while in a manic state. In addition, he wished to subpoena his parole officer's records and to locate and call eyewitnesses to support his defense that it was Reyes who angrily confronted him. As the trial court knew that defendant's purpose was to subpoena multiple records and witnesses, the court reasonably could have expected that the granting of a *Faretta* motion would be followed by a request for a continuance. Indeed, granting the motion would have required the court to consider a continuance. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1039.)

It thus appears from all the circumstances that the court considered the quality of counsel's representation, the reasons for defendant's request, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. We conclude that the trial court properly exercised its discretion in evaluating the situation based on the evidence and then, in denying defendant's motion to represent himself.

Moreover, we agree with respondent that defendant has failed to demonstrate prejudice. The denial of an untimely a motion for self-representation does not present a constitutional issue. (See *Windham, supra*, 19 Cal.3d at p. 129, fn 6.) Thus, an erroneous denial of an untimely *Faretta* motion is reviewed under the harmless error test of *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050.) Under that test, error is deemed harmless unless a review of the whole record demonstrates a reasonable probability the defendant would have achieved a more favorable result absent the error. (*Watson, supra*, at pp. 836-837; Cal. Const., art. VI, § 13.) It is the appellant's burden to establish "a reasonable probability that error affected the trial's result." (*People v. Hernandez* (2011) 51 Cal.4th 733, 746.)

Defendant contends that if he had been permitted to control his own defense, he would have been able to make opening and closing arguments stating his position, without being subject to cross-examination, and he would have been able to show through his mental health records that he did not call for "'fellow' gang members to join the attack [on victim Reyes]." As it was defendant's position that Reyes was the aggressor, it is unlikely that the mere absence of cross-examination would have affected the verdict in defendant's favor, particularly in light of the overwhelming evidence of defendant's guilt, including evidence of his similar modus operandi in the uncharged incident. Further, the jury did not reach a verdict on the gang enhancement, and the allegation was dismissed. Thus, evidence that defendant's call to "get this bitch before I kill her" was not gang related would not have changed the result.

Defendant argues that the validity of his mental health defense was supported by the postconviction probation report, in which his criminal history was "coded" to indicate that he was "mentally disturbed." He then speculates that his sentence might have been

lighter had mental health evidence been presented to the trial court. Speculation is insufficient to establish a reasonable probability under *Watson, supra,* 46 Cal.2d at page 836. (See *People v. Gonzales* (2012) 54 Cal.4th 1234, 1254.)

As respondent observes, "a defendant who represents himself virtually never improves his situation or achieves a better result than would trained counsel. [Citation.]" (*People v. Rivers, supra,* 20 Cal.App.4th at p. 1051; see also *Faretta, supra,* 422 U.S. at p. 834 ["It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts"].) Defendant has not shown a reasonable probability that the result would have been any different here.

II. Aiding and Abetting

Defendant contends that the trial court erred in failing to instruct sua sponte regarding aiding and abetting. Defendant reasons that because count 5 alleged that both defendant and Brown assaulted Reyes by means likely to produce great bodily injury, and because defendant backed away as Brown rushed in to assault Reyes, Brown was the direct perpetrator at that point and defendant could only have been found liable for Brown's assault as an aider and abettor.

A defendant is not the perpetrator unless the evidence shows that his personal conduct satisfied all the elements of the offense, and if not, his or her guilt must rest on derivative liability for another's conduct as a coconspirator or an aider and abettor. (*People v. Delgado* (2013) 56 Cal.4th 480, 489 (*Delgado*).) An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Defendant was not the perpetrator of the assault committed by Brown, as Brown's attempt to commit a violent injury on Reyes was her personal conduct, not defendant's.

A trial court must instruct sua sponte "'on all general legal principles raised by the evidence and necessary for the jury's understanding of the case.' [Citations.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 265.) "In particular, instructions delineating an aiding and abetting theory of liability must be given when such derivative culpability 'form[s] a part of the prosecution's theory of criminal liability and substantial evidence supports the

theory.' [Citation.]" (*Delgado, supra,* 56 Cal.4th at p. 488, quoting *People v. Prettyman, supra,* at pp. 266-267.) "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime. [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164; see also *People v. Beeman* (1984) 35 Cal.3d 547, 561; § 31.) "A person may aid and abet a criminal offense without having agreed to do so prior to the act. [Citations.] In fact, it is not necessary that the primary actor expressly communicate his criminal purpose to the defendant since that purpose may be apparent from the circumstances. [Citations.] Aiding and abetting may be committed 'on the spur of the moment,' that is, as instantaneously as the criminal act itself. [Citation.]" (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531-532.)

After defendant had beaten and kicked Reyes on the ground, and as Reyes was attempting to rise, defendant said, "You better get this bitch before I kill her." Defendant then stepped back as Brown rushed in to batter Reyes, giving rise to the inferences that both defendant and Brown knew of each other's unlawful purpose. Defendant encouraged Brown by his words and facilitated Brown's attack by moving out of her way. Thus, the evidence presented here required sua sponte instruction regarding aiding and abetting. However, any error in failing to so instruct was harmless.[7]

Relying on the concurring opinion of Justice Kennard in *Delgado, supra,* 56 Cal.4th at page 496, defendant contends that the omission of instructions on the principles of aiding and abetting is tantamount to omitting an element of the offense,

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[7] Neither party mentions derivative liability based upon conspiracy, and defendant does not contend that he was harmed by the omission of instructions on that theory. We thus confine our discussion to the question whether the omission of aiding and abetting instructions was harmless.

requiring review under test of *Chapman v. California* (1967) 386 U.S. 18, 24, rather than the less stringent test of *Watson, supra*, 46 Cal.2d at page 836.[8]

It is respondent's position that the trial court should have given an instruction on the principles of aiding and abetting, but contends that any error resulting from failure to do so was harmless even under the more stringent *Chapman* test. We reject respondent's contention that the argument of counsel had the effect of adequately instructing the jury, as such arguments were made solely in relation to the issue of whether the crime was committed in association with or for the benefit of a gang, not with regard to defendant's derivative liability for Brown's assault.[9] However, we nevertheless agree with respondent that any error was harmless under both *Watson* and *Chapman*, as it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra*, 386 U.S. at p. 24.)

Assuming solely for purposes of our analysis that the error was the equivalent of omitting an element of the offense, we must determine "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." (*Neder v. United States* (1999) 527 U.S. 1,19.) We thus turn first to the evidence supporting a finding that defendant did not aid or abet Brown's assault, and then review for evidence that might rationally support a contrary finding.

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8 "[J]ury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant's due process rights under the federal Constitution. [Citations.]" (*People v. Flood* (1998) 18 Cal.4th 470, 491.) However, this is not always the case with regard to instructions on aiding and abetting. (*Delgado*, *supra*, 56 Cal.4th at pp. 491-492.) In *Delgado*, the failure to instruct as to aiding and abetting did not amount to the omission of an element and was thus state law error, because the evidence also supported the defendant's conviction as a perpetrator; thus the *Delgado* majority applied the *Watson* test. (*Delgado*, at pp. 491-492.)

9 As respondent notes, the meaning of "get this bitch before I kill her" was a key point of contention in closing arguments. The prosecutor argued that the logical meaning of "get" her was to hurt her, to continue the assault, and defense counsel argued that the statement could have had an innocent meaning.

Circumstances suggesting aiding and abetting include "presence at the scene . . . , companionship, and conduct before and after the crime, including flight. [Citation.]" (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294; see also *People v. Medina* (2009) 46 Cal.4th 913, 924.) While *mere* presence at a crime scene may not provide substantial evidence of aiding and abetting, presence may, along with other circumstances, support an inference that defendant was present to control the victim (see *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 744), and to encourage the assailant (see *People v. Brown* (1981) 116 Cal.App.3d 820, 825-826). When viewed in light of such factors, there was overwhelming evidence of defendant's participation and encouragement before, during, and after Brown's assault. Defendant had just beaten and kicked Reyes and had invited his friend to "get this bitch"; he then remained close to Reyes while Brown attacked, taking no steps to prevent it, and then left the scene with Brown.

There is no merit to defendant's contention that there was no evidence of encouragement or participation after Brown began her assault on Reyes, or of any attempt to prevent Reyes from driving away after Brown ceased her assault. We reject defendant's speculation that his call to "get this bitch before I kill her" could have been intended as a plea for someone to intercede on behalf of Reyes, rather than encouraging or instigating others to assault Reyes. Defendant did not say "help her" or "get her away from me"; he said "get this bitch," a phrase not reasonably susceptible to an innocent meaning without some evidence of an innocent context. Brown, defendant's own friend, inferred that defendant was calling for an attack upon Reyes. Under such circumstances, no rational jury would have construed defendant's statement as innocent.

As our review of the entire record reveals no evidence that could rationally lead to a finding that defendant did not aid and abet Brown's assault, we conclude that the error was harmless beyond a reasonable doubt. (*Neder*, *supra*, 527 U.S. at p. 19; see *Chapman, supra*, 386 U.S. at p. 24.)

III. Multiple convictions

Defendant contends that his conviction of both counts 1 and 5 was improper because the conduct charged in the two counts were part of "one continuous transaction

occurring in a single location over a short period of time." He argues that the trial court necessarily found that counts 1 and 5 were committed as part of the same, single, continuous transaction when it stayed the sentence imposed as to count 5 pursuant to section 654. He concludes that such a finding demonstrates that count 5 was not a separate or second assault.

Section 654 concerns the propriety of multiple punishments, not multiple convictions, which are governed by section 954. (*People v. Gonzalez* (2014) 60 Cal.4th 533, 537.) "[S]ection 954 provides: 'An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged . . . .' [T]he same act can support multiple charges and multiple convictions. 'Unless one offense is necessarily included in the other [citation], multiple convictions can be based upon a single criminal act or an indivisible course of criminal conduct (§ 954).' [Citation.]" (*People v. Gonzalez, supra*, at pp. 536-537.)

Defendant cites no authority holding that there can be no more than one conviction when the offenses were committed in a "continuous transaction occurring in a single location over a short period of time." Instead, defendant relies on *People v. Coyle* (2009) 178 Cal.App.4th 209, 217, which held that a defendant may not be convicted of multiple counts of the same offense for the same act, when they are merely alleged under alternate *theories*. Defendant also cites two cases that did not involve multiple convictions: *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, a federal civil rights case; and *People v. Jefferson* (1954) 123 Cal.App.2d 219, which rejected a contention that the prosecution was required to elect which acts constituted the crime in a single count of aggravated assault. "'It is axiomatic that cases are not authority for propositions not considered.' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 566.)

"[A] defendant may be convicted of multiple crimes -- even if the crimes are part of the same impulse, intention or plan -- as long as each conviction reflects a completed criminal act." (*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1518; see *People v. Harrison* (1989) 48 Cal.3d 321, 329, 334 [separate acts of sexual penetration]; *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1474 [each injury inflicted in a single episode was a completed crime of corporal injury on a spouse].)

We agree with respondent that defendant's assault was completed prior to Brown's assault. An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) An assault committed with force likely to produce great bodily injury is complete upon the attempted use of the force. (*People v. Yeats* (1977) 66 Cal.App.3d 874, 878.) Defendant had completed his attempted use of force upon Reyes when he personally struck her. Brown then attempted another use of force when after defendant's encouragement, she struck Reyes or violently pushed her to the ground, while defendant stepped out of her way to facilitate the assault. Defendant was properly convicted of both attacks.

IV. Effective assistance of counsel

Defendant contends that his counsel rendered ineffective assistance in violation of the United States and California Constitutions, by failing to investigate or present potentially mitigating evidence of mental illness at the time of sentencing. (See U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.)

It is the defendant's burden to establish that counsel's assistance was constitutionally inadequate and that he was prejudiced by it. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1126.) "If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues, supra,* at p. 1126.)

To show ineffective assistance due to a failure to investigate, a defendant "must demonstrate that counsel knew or should have known that further investigation was necessary, and must establish the nature and relevance of the evidence that counsel failed to present or discover." (*People v. Williams* (1988) 44 Cal.3d 883, 937.) "If the record

on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.) Further, the defendant "must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]" (*People v. Williams, supra*, 44 Cal.3d at p. 937.)

This record fails to show whether counsel did or did not obtain defendant's psychiatric records. Thus, the record fails to show why counsel did not present evidence of defendant's mental health at sentencing. Further, there is no indication that counsel was asked for an explanation, that he failed to provide one, or that there could be no satisfactory explanation. It is quite possible that counsel obtained the records or otherwise determined that evidence of defendant's mental health would not help his cause. As defendant's argument is merely speculation that counsel failed to investigate and that such evidence might have been helpful, we reject his claim.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT